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In the Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN K. ORSBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge abused his discretion by allowing the prosecution to introduce three books depicting sexual acts between adult men and young girls in order to prove that petitioner acted with specific intent, an essential element of the lesser included offenses of the crimes charged.

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OPINIONS BELOW

The initial opinion of the Air Force Court of Military Review (Pet. App. 23a-26a) is unreported. The order of the Court of Military Appeals remanding the case to the court of military review (Pet. App. 27a) is reported at 26 M.J. 287. The opinions of the court of military review on remand (Pet. App. 18a-22a) and after resentencing (Pet. App. 15a-17a) are unreported. The opinion of the Court of Military Appeals affirming the final judgment of the court of military review (Pet. App. 1a-14a) is reported at 31 M.J. 182.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1990. The petition for a writ of

certiorari was filed on December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Luke Air Force Base in Arizona, petitioner, a member of the United States Air Force, was convicted of rape, four sodomy offenses, and three indecent act offenses, in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 925, and 934, respectively. He was sentenced to confinement for 25 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction to the lowest enlisted rank. The convening authority modified one of the findings involving indecent acts, but otherwise approved the findings and sentence as adjudged. In its initial review, the Air Force Court of Military Review further modified the findings to conform to the statute of limitations and affirmed the sentence. The Court of Military Appeals remanded the case to the court of military review for further consideration. On further review, the court of military review set aside the findings of guilty on all the indecent act offenses and ordered a rehearing on sentence. On rehearing, petitioner was sentenced to confinement for 18 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction to the lowest enlisted rank. Following the rehearing on sentence, the convening authority, the court of military review, and the Court of Military Appeals all affirmed the remaining findings and the sentence.

1. The evidence presented at trial showed that petitioner committed a variety of sexual acts upon his daughter, who was eight years old at the time of trial. Pet. App. 3a. In a preliminary session, petitioner challenged the admissibility of three books that were discovered during a search of his

house: *Degraded, Delighted Daughters*; *Chained Youth: Girls in Bondage*; and *The Whore Makers*. PX 6-8. Petitioner claimed that the books were not relevant and that the risk of undue prejudice outweighed the books' probative value. The trial judge deferred ruling on petitioner's objection until both sides had presented their cases. Tr. 195; Pet. App. 4a-5a. After the prosecution concluded its case-in-chief, petitioner's counsel asked the trial judge if he had "reached a ruling on the admissibility of the books in question." *Id.* at 5a. Before the trial judge ruled, petitioner's counsel said that the defense had not yet made a decision as to what evidence, if any, it would present in petitioner's case-in-chief. The trial judge then ruled that the books were admissible, since a number of the lesser included offenses required the prosecution to prove that petitioner acted with specific intent. In ruling on petitioner's objection, the trial judge stated:

> I have specifically considered the potential prejudicial impact in accordance with [Mil. R. Evid.] 403 and I find that the relevance overcomes any possible prejudice. I will of course instruct the members of the court as to the sole use that they can apply these books to.

Pet. App. 7a.

After announcing his ruling, the trial judge permitted the prosecution to re-open its case-in-chief in order to present the books to the court-martial panel. At that time, the trial judge instructed the panel:

> Members of the court, as I have admitted into evidence Prosecution Exhibits 6, 7, and 8, which you have not heard, but you've heard the titles of these particular paperback books, there is the possibility that some people could, per chance, be offended by the subject matter of these books. I want to bring [to] your attention and emphasize that the possession of these books is not

> illegal. There is nothing alleged by the prosecution that there is anything about the substance or the books themselves which is illegal. I have admitted these books for the sole purpose, for a very limited purpose, and the only purpose which you could consider these books for or any evidence that they might have to tend to prove or disprove a specific intent of which I will instruct you later as to some of the lesser included offenses, that would be the attempt to commit a certain crime or the intent to satisfy sexual gratification. The intent would be the only reason that you can consider these books to determine whether it tends to prove or disprove that intent. You may not conclude from this evidence that the accused is a bad person, a person of bad moral character, or otherwise inclined to commit these or any other crimes.

Pet. App. 8a-9a. At the conclusion of all the evidence, before the court-martial panel began deliberations, the trial judge reminded the members of the panel of the limited purpose for which the books could be considered. He instructed them:

> I want to direct your attention to the Prosecution Exhibits 6, 7 and 8, once again, and I want to emphasize to you the very limited purposes for which I have allowed these three exhibits into evidence in this trial. They may be considered by you for the one limited purpose of their tendency, if any, to either prove or disprove the intent of the lesser included offenses as to assault with the specific intent to commit rape or the specific intent to gratify sexual desires. You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person, a person of bad morals, has criminal tendencies, and that he therefore committed the offenses as charged.

Pet. App. 9a.

2. The Air Force Court of Military Review affirmed the trial judge's ruling. Pet. App. 16a-17a, 22a. The court noted that each of the books dealt with "fictional accounts of sexual acts committed upon young girls by adult males" and was relevant "to show what [petitioner's] sexual desires was during the charged offenses." *Id.* at 21a-22a.

3. The Court of Military Appeals affirmed the lower court's decision by a divided vote. The majority rejected petitioner's argument that the books were irrelevant and unduly prejudicial. Pet. App. 10a-13a. Chief Judge Everett filed a brief dissenting opinion in which he concluded that the trial judge abused his discretion in applying the Mil. R. Evid. 403 balancing test. Pet. App. 14a.

ARGUMENT

Petitioner argues that the trial judge abused his discretion by admitting the three books into evidence.

Petitioner's argument rests on the premise that his intent was not a material issue in this case. Pet. 7. Both military appellate courts correctly rejected that claim. Any element of an offense that the prosecution must prove beyond a reasonable doubt is a material issue unless the accused enters a guilty plea or affirmatively removes that element from consideration by the trier of fact. "A simple plea of not guilty," like the one petitioner entered, "puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988).

In this case, the indecent act offenses, the lesser included offenses of rape and sodomy, are specific intent crimes. Petitioner's not guilty plea therefore forced the government to prove that he acted with specific intent. Moreover, petitioner took no action, such as stipulating to the element of intent, that relieved the prosecution of its burden of proof on that element. Indeed, at the time the trial judge ruled on the

admission of the evidence at issue, petitioner was unwilling to commit himself as to how he planned to proceed. Pet. App. 12a. The trial judge therefore acted within his broad discretion in admitting the books because they were relevant to a material issue in the case. See *Hamling* v. *United States*, 418 U.S. 87, 124-125, 127 (1974).

Petitioner contends in passing that the trial judge should have waited until after the defense had presented its case before allowing the government to present the evidence at issue here. Pet. 8. But Mil. R. Evid. 404(b) imposes no such requirement.[1] The rule lists the situations in which "other acts" evidence may be admitted, but it does not require that the trial judge wait until the defense has completed its case before ruling on the admissibility of evidence offered by the prosecution. The timing of such decisions has historically been left to the sound discretion of the trial courts. As this Court has observed in connection with Fed. R. Evid. 404(b), "[t]he trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Federal Rules of Evidence that would change this practice." *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988).

Petitioner further alleges that the prejudicial impact of the books far outweighed their relevance. Pet. 9-10. A trial judge, however, has broad discretion in balancing the probative value of evidence against the risk of undue prejudice.

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[1] Mil. R. Evid. 404(b), which was taken from and is similar to Fed. R. Evid. 404(b), provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

United States v. *Abel*, 469 U.S. 45, 54 (1984). The court of military review and the Court of Military Appeals correctly held that the trial judge did not abuse that discretion here. Pet. App. 13a, 22a. Petitioner was adequately protected from the risk of undue prejudice by the four safeguards identified in *Huddleston* v. *United States*, 485 U.S. at 691-692: the Rule 402 requirement that the evidence be relevant; the Rule 404(b) requirement that the evidence be admitted for a proper purpose; the balancing of the probative value of the evidence against its potential for undue prejudice required by Rule 403; and the requirement in Rule 105 that upon request the trial judge must instruct the trier of fact about the limited purposes for which the evidence may be considered. The trial judge applied each of those safeguards when he admitted the three books, and his ruling did not deny petitioner his right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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